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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)))	GN Docket No. 93-252

To: The Commission

COMMENTS OF PAGEMART, INC.

Phillip L. Spector
Susan E. Ryan
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
1615 L Street, N.W.
Washington, D.C. 20036
Attorneys for PageMart, Inc.

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SUMMARY

The Commission seeks to adopt transitional rules to implement the new regulatory scheme for commercial mobile radio services ("CMRS") mandated by the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"). Specifically, the goal is to harmonize the regulation of historically separate common carrier and private carrier licensees who now will be governed by the new CMRS regulations, so that they are subject to "comparable" regulation. PageMart, Inc. ("PageMart"), a private carrier paging licensee, urges the Commission to develop and implement rules that will impose the least regulatory burden on the rapidly developing and highly competitive mobile services industry. In particular, the Commission should refrain from imposing unnecessary -- and potentially counterproductive -- spectrum caps. Further, in "equalizing" the regulatory burden between private and common carrier licensees, the Commission should consider applying the less onerous private carrier rules to CMRS providers, rather than imposing unnecessary Part 22 regulations.

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PageMart, Inc. ("PageMart"), by its counsel, hereby comments on issues raised in the Further Notice of Proposed Rulemaking ("FNPRM"), FCC 94-100, issued in the above-captioned proceeding on May 20, 1994.

I. INTRODUCTION

In this proceeding, the Commission requests comment on a variety of proposed changes to its rules; the changes are designed to implement the new regulatory scheme for commercial mobile radio service ("CMRS") providers established by the amendments to the Communications Act of 1934, as amended (the "Act"),[1] that were adopted in the Omnibus Budget Reconciliation

[1] 47 U.S.C. § 151 et seq.

Act of 1993.[2/] Specifically, the FNPRM proposes modifications to the existing common carrier mobile service rules, in order to facilitate the transition of historically private carriers to the new CMRS classification. The Commission's statutory goal is to ensure that competing mobile service providers are subject to "comparable" regulatory requirements, and that "inconsistencies" in the regulation of "substantially similar" services are eliminated.[3/] The FNPRM emphasizes that this goal must be pursued in a manner that advances the development of a competitive mobile services marketplace.[4/]

PageMart, a licensee of both common carrier and private carrier paging facilities, submits that the Commission can achieve its pro-competitive goals and meet its statutory requirements for harmonizing mobile service regulation without imposing unnecessary -- and sometimes counterproductive -- "regulatory symmetry" on CMRS providers. Indeed, in the legislative history of the Budget Act, Congress recognized that particular attention must be paid to the differences among CMRS providers and made clear that the Commission was authorized to take these differences into account in framing its CMRS

2/ Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993) (the "Budget Act").

3/ FNPRM ¶ 2. As the Commission noted, the Budget Act "expressly focuses on regulations that affect providers of 'substantially similar' commercial mobile radio services and requires only such rule changes as are 'necessary and practical' to achieve regulatory consistency." Id. ¶ 21.

4/ Id. ¶ 1.

implementing rules.[5] PageMart urges the Commission to utilize this discretion to avoid imposing regulatory burdens where no public interest justification exists.

While PageMart has an interest in virtually all of the Commission's proposed rule changes, it here focuses its comments on three proposals that would have a particularly detrimental and inequitable impact on paging providers: (1) the proposed spectrum aggregation caps; (2) the imposition of existing common carrier application fees on CMRS carriers; and (3) the imposition of the new common carrier regulatory fees on CMRS carriers.

II. SPECTRUM AGGREGATION CAPS ARE NOT NECESSARY TO PROMOTE COMPETITION, AND WILL SUPPRESS THE DEVELOPMENT AND IMPLEMENTATION OF NEW TECHNOLOGIES AND SERVICES

A. The Mobile Services Market Is Highly Competitive And Does Not Need Spectrum Caps.

The Commission's proposal to impose limits on the amount of spectrum that may be held by any particular CMRS provider is unique in the context of the FNPRM, in that it does not respond to a particular mandate of the Budget Act. Instead, the concept has been proposed sua sponte by the Commission, out of concern that, as a result of the combination of the Budget Act's reclassification of formerly private carrier services to CMRS, and subsequent allocations for the new personal communications services ("PCS"), there is a risk that "licensees with the ability to acquire large amounts of CMRS spectrum in a

[5] See H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993) ("Conference Report").

given area could acquire excessive market power by potentially reducing the numbers of competing providers."[6]

The Commission has committed itself to "establish[ing] a regulatory regime in which the marketplace, and not the regulatory arena, shapes the development and delivery of mobile services."[7] While the Commission's concern about the potential for market concentration in CMRS is laudable, it is to a large extent unwarranted.[8] This highly competitive market does not require, and will not benefit from, the kind of regulation contemplated by the Commission. A spectrum aggregation cap would place a concrete limit on the potential growth of each company, forcing the industry to make investment decisions based on government regulation, rather than consumer demand. The proposed cap thus would reduce the attractiveness of the market to new entrants and potential investors, thereby decreasing competition.

B. The Commission Already Has The Tools To Prevent Market Concentration.

In addition to the risk that spectrum caps would stifle growth in the mobile services industry, such caps are unnecessary because the Commission already has the tools to prevent anti-competitive aggregation of spectrum. Under Sections 309(a) and

[6] FNPRM ¶ 89.

[7] Id. ¶ 10.

[8] For example, in the Second Report and Order in this proceeding, 9 F.C.C. Rcd. 1411, 1467-68 (1994), the Commission found that "the record supports a finding that all CMRS service providers, other than cellular service licensees, currently lack market power."

310(d) of the Act, the Commission must consider whether the "public interest, convenience, and necessity will be served" by granting applications for radio licenses,[9] and it has long been established that competitive considerations are an essential element of the "public interest" calculus.[10] Thus, if the Commission were to determine that a particular provider of mobile services had acquired excessive spectrum to the detriment of competition, it already has the authorization to deny a license or to exert its regulatory authority in an appropriate, focused way.[11] In contrast, spectrum caps are a blunt instrument that, while they might discourage some forms of market concentration, also would suppress competition and impose unwarranted limits on growth in the mobile services market.

III. SPECTRUM CAPS SHOULD BE IMPOSED, IF AT ALL, ONLY ON THOSE MOBILE SERVICES THAT ARE THE LEAST COMPETITIVE

As the Commission itself noted, the record does not support treating all CMRS services as part of a single competitive market.[12] The Commission recognized in the FNPRM that it has the authority to limit any spectrum aggregation cap

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[9] 47 U.S.C. §§ 309(a), 310(d).

[10] See, e.g., FCC v. RCA Communications, Inc., 346 U.S. 86, 98 (1953); United States v. FCC, 652 F.2d 72, 81-88 (D.C. Cir. 1980) (en banc); Mansfield Journal Co. v. FCC, 180 F.2d 28, 33 (D.C. Cir. 1950).

[11] See also 47 U.S.C. §§ 312, 314.

[12] FNPRM ¶ 90.

to a particular service.[13] Based on the available evidence, it would seem that the broadband services (i.e., cellular, broadband PCS, specialized mobile radio ("SMR")) are the only services remotely susceptible to market concentration. The cellular market in particular is dominated by a relatively few large providers, in large part because of the Commission's decision to license only two providers in each defined cellular market.[14]

In many respects, the Commission already has responded to the potential competitive threat posed by its various broadband allocations. It has imposed limits on the amount of broadband PCS spectrum that can be acquired by (1) any one entity in any one locale (40 MHz); and (2) a cellular licensee within its existing cellular service area (10 MHz). It is not at all clear that any further restrictions need be imposed at this juncture, even in the broadband realm.

Moreover, in contrast to the existing broadband services, other sectors of the mobile service industry, such as paging, have operated under different licensing policies and are

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13/ Id. ¶ 96, noting that the legislative history of the Budget Act specifically recognizes that "market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services" and that "the Commission may . . . forbear from regulating some providers of commercial mobile services if it finds that such regulation is not necessary to promote competition." See Conference Report at 491.

14/ 47 C.F.R. § 22.902.

fiercely competitive.[15] For example, at present, some 60 percent of the paging market is shared by more than 600 licensed paging companies. This great diversity of choice has applied significant downward pressure on prices for consumers, attracting more than 14.3 million subscribers by 1993.[16] Because the paging market is so competitive, it does not face the threat of monopoly or other forms of market dominance that might make a spectrum cap appear reasonable under other circumstances.

While PageMart does not necessarily favor increased regulation of broadband providers, if the Commission is intent on adopting spectrum caps it would be most effective and logical to place such restrictions only on providers in those markets in which the concentration of market power is at least an arguably foreseeable concern. As the Commission noted, the broadband

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15/ See, e.g., Second Report and Order ¶ 140, in which the Commission noted that "[t]he combination of high capacity, large numbers of service providers, ease of market entry, and ease of changing service providers results in paging being a very competitive segment of the mobile communications market." See also Amendment to the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, 8 F.C.C. Rcd. 4822, 4823 (1993), in which the Commission recognized that "the demand for paging services has grown dramatically in the past few years and is continuing to climb."

16/ See Ann Elizabeth Lynch, "The International Growth of Paging," Global Communications, May 1993, p. 26. The Commission recognized the dynamic growth of the paging market in its "exclusivity" proceeding. See Report and Order, Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, 8 F.C.C. Rcd. 8318 (1993). One observer noted the "increased numbers of service operators and suppliers injecting new life into an established market," predicting continued growth of 10-13% through 1998.

services account for the "lion's share" of CMRS spectrum, and only licensees in those services are likely to have the opportunity to acquire spectrum in amounts that could significantly affect competition.[17/]

IV. IF A SPECTRUM CAP IS IMPOSED, LICENSEES MUST BE PERMITTED TO RETAIN BOTH EXISTING FACILITIES AND THOSE OBTAINED AT THE PCS AUCTIONS

A. Forcing Divestiture of Licenses Would Be Inequitable And Destructive.

If the Commission decides to impose some form of spectrum cap on some or all CMRS services, it is essential that licensees be permitted to retain all of their existing facilities. The failure to "grandfather" existing licenses would be grossly inequitable to companies that have invested substantial resources in the development of services based on those facilities.

Moreover, grandfathered licenses should be transferable without any divestiture requirements. The benefits of grandfathering should attach to the license itself, not just the present licensee. In the mobile services industry, unlike other industries (e.g., broadcasting), spectrum licenses are intertwined into complex, seamless networks that provide a mix of local, regional and nationwide services; these licenses are not readily separable from each other.[18/] Divestiture would, at a

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[17/] FNPRM ¶ 96.

[18/] Compare FCC v. RCA Communications, Inc., supra, 346 U.S. at 98, with United States v. RCA, Inc., 358 U.S. 334, 348-50 (1959).

minimum, depress the value of these businesses, hurt stockholders, and, most importantly, force providers to disrupt service to consumers.

B. A Spectrum Cap Should Permit Licensees To Fill-In Holes In Existing Service Areas And To Expand Existing Areas In A Manner Reasonably Consistent With Demand And Competitive Conditions.

The grandfathering of existing licenses should include the right to fill in holes in existing service areas and should accommodate system expansion in a manner responsive to demand and competitive conditions. Licensees have a reasonable expectation that they will be permitted to maintain and expand service within their general service areas. A failure to allow licensees to realize this expectation would be detrimental both to the industry and to consumers. Licensees would be locked in to their current competitive position, unable to respond to future demand. Customers, meanwhile, would be faced with gaps in service and, in all likelihood, increased costs. Neither result would further the Commission's goals.

C. A Spectrum Cap That Requires Divestiture As A Consequence of Licenses Acquired At the PCS Auctions Would Be Completely Unwarranted, And Would Substantially Depress The Auction Market.

Any cap on spectrum must also exclude any licenses that are acquired during the Commission's upcoming PCS auctions.[19]

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[19] It may well be that the Commission will conclude this proceeding prior to the broadband PCS auctions. It is exceedingly unlikely, however, that this matter will be concluded prior to the narrowband PCS auctions already scheduled for late July. See Implementation of Section (continued...)

The PCS industry, and individual CMRS providers, should not be subjected to the uncertainty of not knowing whether they will be able to retain licenses for which they wish to place bids. Imposition of a retroactive spectrum cap after the bidding would be entirely irrational.

Moreover, the possibility of retroactive application may depress substantially the value of the spectrum to be auctioned. Fewer companies will come forward to bid and those that do will be far more timid than otherwise would be the case. This, in turn, could result in slower development and implementation of PCS technology, and consequently, in delayed, potentially inferior, service to the public. PageMart urges the Commission to avoid this result by refraining from imposing spectrum caps at all where possible and, where deemed necessary, to tailor narrowly any such caps so that they are imposed only mobile services that face the greatest risk of market concentration.

[19/] (...continued)
309(j) of the Communications Act -- Competitive Bidding, Third Report and Order, FCC 94-98, PP Docket 93-253 (released May 10, 1994); Public Notice -- Auction Notice and Filing Requirements for Ten Nationwide Licenses for Personal Communications Services in the 900 MHz Band, Report No. AUC-94-01, May 23, 1994.

V. THE COMMISSION SHOULD NOT ARBITRARILY INCREASE APPLICATION FEES FOR CMRS PROVIDERS

The Commission has proposed to require all CMRS applicants to pay the same application filing fees as presently are imposed on Part 22 licensees.[20] For Part 90 paging providers, the result of this proposal would be an increase in fees from $35 to $230 per application.[21] On its face, this increase in fees may appear consistent with notions of "regulatory symmetry." In practice, however, the proposal would impose significant, unreasonable burdens on many CMRS providers. Congress specifically required rule changes that are "necessary and practical" to ensure that mobile service licensees are subject to "comparable" regulation.[22] PageMart submits that an arbitrary application of the common carrier fees to private carriers that will be reclassified as CMRS is neither "necessary" nor "practical."

The current application fee structure for Part 90 applicants works exceedingly well. As the certified frequency coordinator for private mobile services under Section 1.912 of the Rules, 47 C.F.R. § 1.912, the National Association of Business and Educational Radio ("NABER") efficiently carries out its responsibilities in conjunction with the Private Radio Bureau ("PRB") office in Gettysburg, Pennsylvania. NABER and the PRB consistently have processed applications in two to four weeks, at

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20/ FNPRM ¶ 115.

21/ Id.

22/ Budget Act, § 6002 (d)(3).

a total cost well below the common carrier fee. By contrast, even allowing for the 30-day public notice period required for Part 22 licenses but not for Part 90 licenses, see 47 U.S.C. § 309(b), applications under the common carrier regulations typically take three to four months to process. In addition, although the Commission proposes to charge all CMRS applicants the common carrier application fee, it presumably will continue to rely on NABER to provide frequency coordination for the frequencies currently allocated for Part 90 services.[23]

In brief, it is likely that the Commission's proposal would cost Part 90 CMRS providers nearly twice as much as they currently pay, for a process that may take more than four times as long as it does now to complete. PageMart urges the Commission not to adopt rules that would create this absurd result.

If the Commission determines that complete "regulatory symmetry" is necessary in the area of application fees, it would be far more equitable and efficient to apply the current Part 90 system to Part 22 licensees, rather than the reverse. In keeping with the goals of the National Performance Review Board to reinvent government, the result would be to enhance the efficiency of the CMRS application process, thereby reducing regulatory costs which would otherwise be passed on to consumers. In contrast, the Commission's proposal would impose burdensome costs on CMRS licensees with no countervailing benefit.

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[23] See FNPRM ¶ 109.

VI. THE COMMISSION SHOULD NOT ARBITRARILY INCREASE REGULATORY FEES FOR CMRS PROVIDERS

The Commission has proposed to impose the same fee of $60 per 1000 subscribers on all CMRS licensees, including private carrier paging licensees, instead of the $16 per license fee on Part 90 operators that the fee schedule currently provides.[24/] Applying the same rationale used for the proposed steep increase in application fees for historically private carriers the Commission's regulatory fee proposal adheres rigidly to a "regulatory symmetry" principle, without accounting for the consequences of such a rule.

To begin with, the Budget Act requires that the Commission's regulatory fees bear some relationship to the cost of regulating the service in question.[25/] Specifically, the statute authorizes the Commission to assess and collect fees "to recover the costs of . . . enforcement activities, policy and rulemaking activities, user information services, and international activities."[26/] In addition, the statute requires that the Commission derive these fees by "determining the full-time equivalent number of employees performing" the specified regulatory functions, "adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[27/]

24/ Id. ¶ 116.

25/ See 47 U.S.C. § 159.

26/ Budget Act, § 6003(a)(1).

27/ Id.

The Commission's proposal to superimpose common carrier regulatory fees on private carriers who will be reclassified as CMRS providers does not meet these statutory requirements. Indeed, the Commission does not appear to have conducted any analysis of regulatory costs that will result from the reclassification of private carriers to the CMRS category. Instead, the Commission appears to have decided to increase the fees for private carriers (through the imposition of common carrier fee rates) simply for its own expediency.

For example, the Commission has not indicated how it determined that a fee of $60 per 1000 subscribers, as opposed to $16 per license, would be required to cover Commission costs, nor has it indicated how its services would change, or how the increased costs would be "reasonably related" to the benefits provided to the payor of the increased fees (i.e., the private mobile service providers). On the contrary, it appears that Part 90 CMRS providers will be receiving at best the same (and arguably reduced) benefits in exchange for these increased fees. If the Commission insists on symmetry, all CMRS licensees should be subject to the current Part 90 regulatory fee schedule.

VII. CONCLUSION

PageMart appreciates the difficult task faced by the Commission in implementing the statutory mandate of the Budget Act that "substantially similar" mobile services be subjected to "comparable" regulation. Harmonizing the numerous different regulatory and technical rules to which mobile service providers are subjected is a complex undertaking, and one that will have significant and lasting consequences for all CMRS providers. PageMart urges the Commission to utilize its discretion to implement the statutory mandate in a logical and practical manner, avoiding the imposition of unnecessary layers of regulation and restrictions where none is required.

In particular, PageMart is concerned that the Commission's proposal to impose spectrum caps on some or all CMRS providers could create daunting obstacles to the expansion and development of this competitive industry. PageMart also is concerned that the blanket imposition of common carrier rules (e.g., regulatory and application fees) on historically private carrier licensees is neither equitable nor consistent with the public interest. PageMart submits that an alternative approach to harmonization of regulation -- e.g., by adoption of many of the current private carrier licensing rules for all CMRS providers -- would best serve the public interest in a manner consistent with the statutory mandate of the Budget Act.

Respectfully submitted,

PAGEMART, INC.

BY: ______________________

Phillip L. Spector
Susan E. Ryan
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1615 L Street, N.W.
Washington, D.C. 20036
(202) 223-7300

Its Attorneys

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